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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/787,377	08/31/2001	Marco Johannes Christina Van Amelsvoort	9424.147USWO	9632
7590	03/09/2009		EXAMINER	
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PO Box 2903				
Minneapolis, MN 55402-0903			ART UNIT	PAPER NUMBER
			3634	
			MAIL DATE	DELIVERY MODE
			03/09/2009	PAPER

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte MARCO JOHANNES CHRISTINA VAN AMELSVOORT

Appeal 2009-0514
Application 09/787,377
Technology Center 3600

Decided¹: March 9, 2009

Before RICHARD E. SCHAFER, JAMESON LEE and SALLY C. MEDLEY,
Administrative Patent Judges.

MEDLEY, *Administrative Patent Judge*.

¹ The two month time period for filing an appeal or commencing a civil action, as recited in 37 CFR § 1.304, begins to run from the decided date shown on this page of the decision. The time period does not run from the Mail Date (paper delivery) or Notification Date (electronic delivery).

DECISION ON APPEAL

A. Statement of the Case

Marco Johannes Christina Van Amelsvoort ("Van Amelsvoort"), the real party in interest, seeks review under 35 U.S.C. § 134(a) of a Final Rejection of claims 20-27 and 29-50. We have jurisdiction under 35 U.S.C. § 6(b). We affirm.

Referring to figure 1, [numbers from **figure 1** inserted], Van Amelsvoort discloses a vertical slatted blind that includes vertical slats [30] comprising first and second portions [32], [34]. The first portion [32] corresponds to a first face of the blind that transmits substantially no light, e.g., (B, I). The second portion [34] corresponds to the second face of the blind that can transmit incident light, e.g., (B, II). (Spec. pp. 6-7).

Figure 1, reproduced from Van Amelsvoort's figure 4, is below:

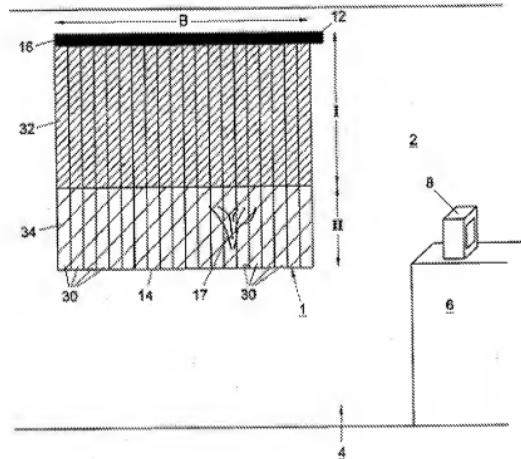


Figure 1 depicts Van Amelsvoort's vertical slatted blind.

Representative claim 20 reads as follows:

A vertical slatted blind comprising vertical slats, wherein the blind, when brought into a condition ready for use, comprises first and second faces defined by the vertical slats and extending in a horizontal direction over a portion of a width of the blind, the second face being oriented vertically below the first face, and each of said slats transmits substantially no light for a first portion of each slat corresponding with the first face and partially transmits light for a second portion of each slat corresponding with the second face, wherein the first face transmits substantially no light and the second face subdues incident light in such a manner that a person present at his workplace in an inner space provided with the blind can still look outside through the second face.

(Br. 24, Claims Appendix).

The Examiner relies on the following prior art in rejecting the claims on appeal:

Kearny	2,646,114
Johnston et al.	4,813,198
Levert	6,123,137
Fisher ²	DE 19537190

The Examiner rejected claims 20, 21, 23-27, 29-31, 33-38 and 43-50 as unpatentable under 35 U.S.C. § 103(a) over Fisher alone, and over Fisher and Kearny.

The Examiner rejected claim 22 as unpatentable under 35 U.S.C. § 103(a) over Fisher and Levert, and over Fisher, Kearny and Levert.

The Examiner rejected claims 32 and 39-42 as unpatentable under 35 U.S.C. § 103(a) over Fisher and Johnson, and over Fisher, Kearny and Johnson.

² Van Amelsvoort and the Examiner refer to the Fisher reference as “German 19537190”, “German”, “German ‘190” or “190”.

B. Issues

Does Van Amelsvoort demonstrate that the Examiner erred in determining that claims 20, 21, 23-27, 29-31, 33-38 and 43-50 would have been obvious on the bases that (1) Kearny is non-analogous art; (2) the references provide no motivation or suggestion to modify Fisher in view of Kearny; (3) there is no motivation because the problem to be solved by the inventor is different from Fisher's problem; (4) the Examiner utilizes hindsight; (5) it is unclear how or why one with ordinary skill in the art would modify Fisher in light of Kearny's teachings; (6) Fisher teaches away from the modification; and (7) the modification renders Fisher unsatisfactory for its intended purpose?

C. Findings of Fact ("FF")

Fisher

1. Fisher describes a vertical blind that includes a multiplicity of vertical blind slats [10]. (Translation p. 2, ll. 5-9, p. 5, ll. 3-6).
2. Referring to figure 2 below [numbers from **figure 2** inserted], Fisher describes that each vertical blind slat [10] has a first part [12] and a second part [14]. (Translation p. 4, l. 13).
3. The first part [12] consists of a material strip [20] with perforations [18]. (Translation p. 4, ll. 17-18).
4. The second part [14] consists of a material strip [22] without holes. (Translation p. 4, ll. 18-21).
5. The second part [14] of slat [10] reflects incident sunlight while the first part [12] of slat [10] allows sun rays to pass into the interior space. (Translation p. 5, ll. 15-19).

Figure 2, reproduced from Fisher's figure 1, is below:

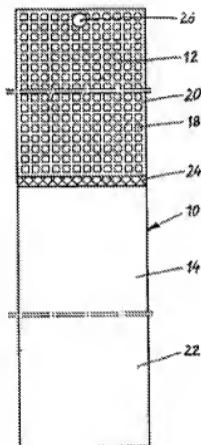


Figure 2 depicts Fisher's vertical blind slat.

6. Fisher describes that, similar to horizontal blinds, the design of its vertical blind slats provides blinding protection adjacent the window while maintaining room illumination by daylight. (Translation p. 2, ll. 12-15).
7. Fisher describes that in the upper region of the blind daylight can penetrate the room and the depth of the room can be illuminated by natural light contributing to energy savings. (Translation p. 2, ll. 19-24).
8. Fisher describes that a further positive effect of divided vertical blind slats is protection from people looking in. (Translation p. 2, ll. 25-28).

Kearny

9. Referring to figure 3, [numbers from **figure 3** inserted], Kearny describes a Venetian shade assembly including a window shade

assembly [10] constituting the upper portion and a Venetian blind assembly [12] constituting the lower portion. (Col. 2, l. 49-col. 3, l. 11).

10. Window shade assembly [10] consists of a pliable sheet of material [14] of conventional and usual materials. (Col. 3, ll. 11-21).

11. Window shade assembly [10] selectively covers predetermined portions of the window opening as desired. (Col. 3, ll. 21-28).

12. Venetian blind assembly [12] includes Venetian blind slats made of a suitable material. (Col. 3, ll. 35-46).

13. Slats may be readily tilted in accordance with conventional practice by means of a tilting rail [20]. (Col. 3, ll. 65-71).

Figure 3, reproduced from Kearny's figure 7, is below:

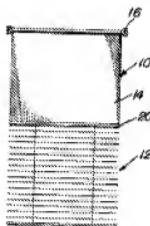


Figure 3 depicts Kearny's Venetian shade assembly.

14. Referring to figure 4, [numbers from **figure 4** inserted], Kearny describes the arrangement of the Venetian shade assembly may be reversed with the Venetian blind assembly [12] disposed at the upper part of the assembly and the widow shade assembly [10] disposed below Venetian blind assembly [12]. (Col. 2, ll. 31-36, col. 4, ll. 39-45).

Figure 4, reproduced from Kearny's figure 7, is below:

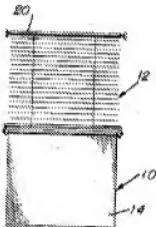


Figure 4 depicts Kearny's alternate Venetian shade assembly.

15. Kearny implicitly teaches that users may require window treatments with different orientations of the light transmitting portions and light blocking portions, and that such window treatments can be adapted accordingly.
16. Kearny demonstrates that it is within the level of ordinary skill in the art to reverse the orientation of the light transmitting portion and the light blocking portion of a window treatment.

D. Principles of Law

“Two separate tests define the scope of analogous prior art: (1) whether the art is from the same field of endeavor, regardless of the problem addressed and, (2) if the reference is not within the field of the inventor's endeavor, whether the reference still is reasonably pertinent to the particular problem with which the inventor is involved.” *In re Bigio*, 381 F.3d 1320, 1325 (Fed. Cir. 2004).

“A person of ordinary skill is also a person of ordinary creativity, not an automaton.” *KSR Int'l Co. v. Teleflex Inc.*, 127 S.Ct. 1727, 1742 (2007).

“When there is a design need or market pressure to solve a problem and there are a finite number of identified, predictable solutions, a person of

ordinary skill in the art has good reason to pursue the known options within his or her technical grasp. If this leads to the anticipated success, it is likely the product not of innovation but of ordinary skill and common sense.” *Id.*

In *KSR*, the Supreme Court rejected the rigid application of the “teaching, suggestion, or motivation” (TSM) test, instead favoring the “expansive and flexible approach” used by the Court. *KSR* at 1739.

In an obviousness analysis, it is not necessary to find precise teachings in the prior art directed to the specific subject matter claimed because inferences and creative steps that a person of ordinary skill in the art would employ can be taken into account. *Id.* at 1741.

“In determining whether the subject matter of a [] claim is obvious, neither the particular motivation nor the avowed purpose of the [applicant] controls.” *Id.* at 1741-42.

Any judgment on obviousness is in a sense necessarily a reconstruction based on hindsight reasoning, but so long as it takes into account only knowledge which was within the level of ordinary skill at the time the claimed invention was made and does not include knowledge gleaned only from applicant’s disclosure, such a reconstruction is proper.

In re McLaughlin, 443 F.2d 1392, 1395 (CCPA 1971).

“The test for obviousness is not whether the features of a secondary reference may be bodily incorporated into the structure of the primary reference; nor is it that the claimed invention must be expressly suggested in any one or all of the references. Rather, the test is what the combined teachings of the references would have suggested to those of ordinary skill in the art.” *In re Keller*, 642 F.2d 413, 425 (CCPA 1981).

In *In re Gurley*, the Federal Circuit stated:

A reference may be said to teach away when a person of ordinary skill, upon reading the reference, would be discouraged from following the path set out in the reference, or would be led in a direction divergent from the path that was taken by the applicant. The degree of teaching away will of course depend on the particular facts; in general, a reference will teach away if it suggests that the line of development flowing from the reference's disclosure is unlikely to be productive of the result sought by the applicant.

27 F.3d 551, 553 (Fed. Cir. 1994).

E. Analysis

Obviousness of claims 20, 21, 23-27, 29-31, 33-38 and 43-50 over Fisher and Kearny

Independent claim 20 is representative and recites:

A vertical slatted blind comprising vertical slats, wherein the blind, when brought into a condition ready for use, comprises first and second faces defined by the vertical slats and extending in a horizontal direction over a portion of a width of the blind, the second face being oriented vertically below the first face, and each of said slats transmits substantially no light for a first portion of each slat corresponding with the first face and partially transmits light for a second portion of each slat corresponding with the second face, wherein the first face transmits substantially no light and the second face subdues incident light in such a manner that a person present at his workplace in an inner space provided with the blind can still look outside through the second face.

(Br. 24, Claims Appendix).

The Examiner finds that Fisher describes vertical slats [10] having an upper region [12] with perforations [18] for light transmission and a lower region [14] that blocks light. (Final Rejection 2). The Examiner finds that the difference between Fisher and the claimed invention is the orientation of

the light blocking portion and the light transmitting portion of the vertical slats. The Examiner finds that Kearny describes a blind with an upper portion (analogous to the roller shade [14]) as light blocking and the lower portion (analogous to the Venetian blind portion [12]) as light permitting. (Final Rejection 3).

Kearny describes a Venetian shade assembly including a window shade assembly [10] constituting an upper portion which covers predetermined portions of the window. (FFs 9, 11). A Venetian blind assembly [12] constitutes the lower portion of the Venetian shade assembly and allows light to be transmitted through the Venetian blind slats when the slats are appropriately tilted. (FFs 10, 13). Kearny further describes that the arrangement of the Venetian shade assembly may be reversed resulting in the Venetian blind assembly [12] disposed at the upper part of the device and the widow shade assembly [10] disposed at the bottom. (FF 14).

Upon reading Kearny, one of ordinary skill in the art would appreciate that users may require window treatments with different orientations of the light transmitting portions and light blocking portions and that such window treatments can be adapted accordingly. (FF 15). Kearny demonstrates that it is within the level of ordinary skill in the art to reverse the orientation of the light transmitting portion and the light blocking portion of a window treatment. (FF 16). It would have been obvious to one with ordinary skill in the art to reverse the light transmitting portions and the light blocking portions of Fisher's vertical slats [10] since it is within the level of ordinary skill in the art to adapt the orientation of the light transmitting portions and light blocking portions of a window treatment in accordance with a user's

needs. “A person of ordinary skill is also a person of ordinary creativity, not an automaton.” *KSR* at 1742.

Van Amelsvoort argues that one of ordinary skill in the art, looking at Fisher’s disclosure, would not have consulted Kearny because it describes an entirely different type of window decoration comprising horizontal slats and a pliable shade material. (Br. 20). Van Amelsvoort appears to argue that Kearny is non-analogous art. However, Van Amelsvoort does not address whether Kearny is from the same field of endeavor, regardless of the problem addressed or if the reference is not within the field of endeavor, whether the reference still is reasonably pertinent to the particular problem.

Van Amelsvoort argues that one of ordinary skill in the art would have had no motivation or suggestion from either reference to modify the configuration of Fisher in view of Kearny. (Br. 21). In particular, Van Amelsvoort argues that Kearny does not provide sufficient motivation because the problem to be solved by Van Amelsvoort is entirely different and would have only been provided by hindsight, looking at the Applicant's own specification and discussion of the problem. (Br. 21). Van Amelsvoort also argues that it is not clear why one of ordinary skill in the art would refer to Kearny for modifying Fisher’s blind, nor is it clear how one would perform such a modification since Kearny’s imperforate blinds do not provide any suggestion for a combination with a perforated vertical slat design. (Br. 20-21, citing Kearny col. 3, ll. 42-46).

Van Amelsvoort’s arguments are unpersuasive. It is not necessary to find precise teachings in the prior art directed to the specific subject matter claimed because inferences and creative steps that a person of ordinary skill in the art would employ can be taken into account. In addition, neither the

particular motivation nor the avowed purpose of the applicant controls the determination of whether the subject matter of a claim is obvious. Further, Van Amelsvoort appears to argue that Kearny's blind assembly must be bodily incorporated into Fisher's blind assembly. However, the test for obviousness is not whether the features of a secondary reference may be bodily incorporated into the structure of the primary reference. Instead, the test is what the combined teachings of the references would have suggested to those of ordinary skill in the art.

As explained before, Fisher describes the claimed structure and, based on Kearny, one with ordinary skill in the art would understand that users may require window treatments with different orientations of the light transmitting portions and the light blocking portions and that the orientation of window treatments can be adapted or reversed accordingly. (FFs 15-16). The Examiner does not engage in impermissible hindsight because the Examiner only takes into account knowledge which was within the level of ordinary skill – adapting or reversing the orientation of light transmitting portions and light blocking portions of a window treatment in accordance with a user's needs. (See FFs 15-16).

Van Amelsvoort argues that Fisher expressly teaches away from using horizontal blinds. (Br. 20, citing Fisher Translation p. 1, ll. 4-24, p. 2, ll. 1-1). More specifically, Van Amelsvoort argues that Fisher teaches away because the object of Fisher's invention is to provide vertical slat blinds that provide certain advantages over horizontal blinds and which also shield a portion of the room from people looking in while at the same time allowing the higher rays to travel to the rear part of the room to illuminate the entire room, leading to energy savings. (Br. 21; see FFs 6-8).

Van Amelsvoort's arguments are unpersuasive. Van Amelsvoort does not explain why a person of ordinary skill, upon reading Fisher, would be discouraged from following the path set out in Fisher, or would be led in a direction divergent from the path that was taken by Van Amelsvoort. Fisher teaches that it is desirable to shield the portion of the room which is relatively close to the window while at the same time allowing the higher rays to travel to the rear part of the room to illuminate the entire room, leading to energy savings. (FFs 6-7). Van Amelsvoort does not direct us to, and we can not find where Fisher teaches that it would be detrimental or disadvantageous to do the opposite.

Last, Van Amelsvoort argues that reversing both portions of Fisher's blind configuration to provide a blind that has a transparent lower face and a non-transparent upper face would defeat Fisher's stated purpose of providing visual security by blocking visibility through the lower part of the blind. (Br. 22; FF 8). Van Amelsvoort's arguments are unpersuasive.

The Fisher reference is not limited to the specific purpose of providing visual security by blocking visibility through the lower part of the blind. Fisher is available for all that it teaches, particularly a vertical blind with vertical slats each having a first light blocking portion and a second light transmitting portion. "The use of patents as references is not limited to what the patentees describe as their own inventions or to the problems with which they are concerned. They are part of the literature of the art, relevant for all that they contain." *In re Heck*, 699 F.2d 1331, 1332-33 (Fed. Cir 1983) (quoting *In re Lemelson*, 397 F.2d 1006, 1009 (CCPA 1968).

In any event, whether modifying Fisher's blind would defeat the purpose of providing visual security is dependent upon the size of the non-

transparent lower face of Fisher's modified blind. For example, a blind having a transparent lower face of only two inches in height located adjacent to the floor when the blind is installed and the remainder of the blind comprising a non-transparent face, would not defeat the purpose of providing visual security by blocking visibility through the lower part of the blind. In this example, Fisher's purpose will still be achieved because visibility through the lower part of the blind would be blocked with the exception of the two inches closest to the floor.

For all these reasons, Van Amelsvoort does not sufficiently show that the Examiner erred in determining that claims 20, 21, 23-27, 29-31, 33-38 and 43-50 over Fisher and Kearny

Since we have addressed the arguments directed to the obviousness rejections over Fisher and Kearny, we need not and will not address the arguments directed to the obviousness rejections over Fisher alone.

Obviousness of claims 22 over Fisher, Kearny and Levert

Claim 22 is dependent on claim 20. (Br. 24). Van Amelsvoort does not present arguments specific to the limitations of claim 22. Therefore, for the same reasons explained above with respect to claims 20, 21, 23-27, 29-31, 33-38 and 43-50, Van Amelsvoort does not demonstrate that the Examiner erred in determining that claim 22 is obvious over Fisher, Kearny and Levert.

Since we have addressed the arguments directed to the obviousness rejections over Fisher, Kearny and Levert, we need not and will not address the arguments directed to the obviousness rejections over Fisher and Levert.

Obviousness of claims 32 and 39-42 over Fisher, Kearny and Levert

Claims 32 and 39-42 are ultimately dependent on claim 29. (Br. 25-26). Van Amelsvoort does not present arguments specific to the limitations of claims 32 and 39-42. Therefore, for the same reasons explained above with respect to claims 20, 21, 23-27, 29-31, 33-38 and 43-50, Van Amelsvoort does not demonstrate that the Examiner erred in determining that claims 32 and 39-42 are obvious over Fisher, Kearny and Johnston.

Since we have addressed the arguments directed to the obviousness rejections over Fisher, Kearny and Johnston; we need not and will not address the arguments directed to the obviousness rejections over Fisher and Johnston.

F. Conclusions of Law

Based on the Findings of Fact and the Analysis above, Van Amelsvoort has not sufficiently demonstrated that the Examiner erred in determining that claims 20, 21, 23-27, 29-31, 33-38 and 43-50 would have been obvious on the bases that: (1) Kearny is non-analogous art; (2) the references provide no motivation or suggestion to modify Fisher in view of Kearny; (3) there is no motivation because the problem to be solved by the inventor is different from Fisher's problem; (4) the Examiner utilizes hindsight; (5) it is unclear how or why one with ordinary skill in the art would modify Fisher in light of Kearny's teachings; (6) Fisher teaches away from the modification; and (7) the modification renders Fisher unsatisfactory for its intended purpose.

G. Decision

The decision of the Examiner rejecting claims 20, 21, 23-27, 29-31, 33-38 and 43-50 as unpatentable under 35 U.S.C. § 103(a) over Fisher and Kearny is affirmed.

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The decision of the Examiner rejecting claim 22 as unpatentable under 35 U.S.C. § 103(a) over Fisher, Kearny and Levert is affirmed.

The decision of the Examiner rejecting claims 32 and 39-42 as unpatentable under 35 U.S.C. § 103(a) over Fisher, Kearny and Johnson is affirmed.

No time period for taking any subsequent action in connection with the appeal may be extended under 37 C.F.R. § 1.136(a).

AFFIRMED

rvb

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